IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 134 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

SARABHAI PRIVATE LIMITED

Appearance:

1. INCOME TAX REFERENCE No. 134 of 1988
MR MANISH R BHATT for Petitioner No. 1
MR BB NAIK for Petitioner No. 1
MR. B.D. KARIA AND MR RK PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE K.M.MEHTA

Date of decision: 21/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.M.MEHTA)

1. The Commissioner of Income-tax, Ahmedabad applicant has filed this Reference under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as he Act'). At the instance of the Revenue the following questions are referred for the opinion of this Court.

1. "Whether, the Appellate Tribunal is right in law in confirming the order made by the Commissioner of Income-tax (Appeals) allowing the assessee's claim of depreciation?

2. Whether, the tribunal is right in law in allowing collection charges amounting to 6% of Annual Letting Value under the head "house property income" and also allowing balance amount from the income under Section 56 of the Income-tax Act, 1961?

3. Whether, the Appellate Tribunal is right in law in upholding the order of the Commissioner of Income-tax (Appeals) bifurcating the income as income from "house property" and income from "other sources"?

4. Whether, the Appellate Tribunal is right in law in confirming the order made by the Commissioner of Income-tax (Appeals) allowing the assessee's claim of depreciation?

5. Whether, the Appellate Tribunal is right in law in allowing the claim of the assessee regarding depreciation amounting to Rs. 50,486/- on other assets?"

1.1 At the instance of the assessee, the following question is referred to this court for its opinion.

"Whether, on the facts and in the circumstances of the case, the Tribunal was not justified in accepting the income from complex letting as "income from business" and whether the Tribunal was justified in law in allowing only 1/6th repairs of the properties in question in

place of repairs to building at Rs. 2,08,118/- (Rs. 1,94,476/- for A.Y. 1975-76) claimed as business expenses?"

BASIC FACTS:

2. Sarabhai Private Limited, assessee, respondent herein, is a Company incorporated under the Companies Act. It has the following properties, namely, (i) Shahibaug House situated at 13 Wittest Road, Bellard Estate, Bombay, (ii) Ahmedabad House situated at 15, Wittest Road, Bellard Estate, Bombay, (iii) Kashmir House, situated at 94, Napean Sea Road, Bombay and (iv) Shanti Sadan Estate, Mirzapur Road, Ahmedabad. The assessee let out all these properties to its various tenants. As regards Shahibaug House, the assessee entered into an agreement on 26.7.1971 with the tenants. As regards the Ahmedabad House the assessee entered into agreement on 19.8.1971. Subsequently, the said agreements were entered into to give the properties on lease as well as to provide certain services, amenities and facilities by the assessee (landlord) to its tenants. As regards other properties, similar agreements are entered into but same are not on record. Some of the services which were to be provided were (i) Housekeeping which includes watch and ward, sweepers, maintenance staff and liftman, (ii) Canteen facilities, (iii) Internal telephone exchange, (iv) Maintenance staff for central air-conditioning including air-conditioning units, electrical fittings etc. (v) Providing water coolers, (vi) Recreation corner (vii) Creation and Maintenance of facilities for locating central air-conditioning plant, (viii) Providing furniture and fixtures, (ix) Electrification, (x) Providing costly electrical installations, (xi) Providing special facilities for external telephones and telex.

2.1 It may be noted that upto assessment year 1972-73 rental income from the said properties was shown under the head "income from house property" and was taxed as such. In the accounting year 1971-72 i.e. the previous year relevant to the assessment year 1972-73 the assessee company started providing various services to its tenants. Service agreements which have been referred to above are on record. It is the case of the assessee that by virtue of the said agreement the assessee provided certain facilities to its tenants over and above the possession of the properties in question.

PREVIOUS BACKGROUND:

3. However for assessment years 1972-73 and 1973-74 income was returned under the head "income from house property". In assessment year 1973-74 the assessee

company during the course of assessment proceedings requested the Income-tax Officer (hereinafter referred to as "the ITO") to tax the income from service charges under the head "income from business". The I.T.O. rejected this claim of the assessee which was upheld by the Appellate Assistant Commissioner. The assessee company had not preferred any appeal before the Income-tax Appellate Tribunal against the said order.

PRESENT CONTROVERSY:

4. However, for assessment year 1974-75 and onwards the assessee company filed returns of income showing income under the head "business" in the case where there was complex letting i.e rental income as well as income from service charges was shown under the head "income from business". In cases where there was simple letting, the rental income was shown under the head "property income". However, for assessment year 1974-75 the ITO by his order dated 19.9.1977 rejected the said claim of the assessee and for assessment year 1975-76 the ITO by his order dated 7.9.1978 was pleased to reject the said claim of the assessee. In the said assessment years the assessee also claimed depreciation in respect of assets other than buildings used by the assessee. The ITO was pleased to reject the said claim of the assessee.

5. Being aggrieved and dissatisfied with the said order of the ITO, the assessee preferred appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, for assessment year 1974-75 was pleased to reject the said claim of the assessee by his order dated 20.2.1978. However for the assessment year 1975-76 the Commissioner of Income tax (Appeals) by his order dated 16.9.1980 accepted the contention of the assessee and bifurcated the income and had taxed rental income under the head "income from house property" and income from service charges under the head "income from other sources. As regards depreciation, the Commissioner of Income-tax (appeals) held that in respect of building no depreciation is allowed under Section 22 of the Act and depreciation is allowed under Section 57 of the Act.

6. Being aggrieved and dissatisfied with the aforesaid order, the assessee filed appeal for assessment year 1974-75 and the Revenue filed appeal for assessment year 1975-76. The Income Tax Appellate Tribunal heard the appeals for assessment years 1974-75, 1975-76 and 1976-77 filed by the Revenue as well as the assessee. The Tribunal by its order dated 16.12.1987 upheld the order of the Commissioner of Income-tax (Appeals) for the assessment year 1975-76. As regards income from property let out to the tenants, the Tribunal held that the same

is income from house property. As regards income from other sources, the Tribunal relying on the judgements of the Hon'ble Supreme Court in the cases of COMMISSIONER OF INCOME TAX VS. NATIONAL STORAGE PVT. LTD. reported in 66 ITR 596 and KARNANI PROPERTIES LTD. VS. CIT reported in 82 ITR 547 upheld the decision of the Commissioner of Income-tax (Appeals) and held that income from service rendered would be assessable as income from other sources. As regards other aspect regarding repairs, the Tribunal has held that the same is allowable under Section 22 of the Act. As regards depreciation, the Tribunal held that depreciation is not allowable under Section 57 of the Act.

7. In view of the said order of the Tribunal, both Revenue and the assessee have referred the aforesaid questions for opinion of this court.

8. Learned counsel for the assessee Mr. Bhargav D. Karia has contended that where the property which is let or given on licence is not bare tenement but is a complex one e.g. a well-equipped building including special devices, facilities and services or an air-conditioning plant or well furnished paying guest establishment, or sheds with infrastructural facilities, the income cannot be said to be derived from mere ownership of house property but may be assessable as income from business. He has stated that the nature of service has been mentioned in the agreement which we have referred to earlier in this behalf. He stated that whatever income which the assessee earned by way of service may be treated as business income.

8.1 In support of the above contention, the learned counsel for the assessee has relied on the judgement of the Hon'ble Supreme Court in the case of CIT VS. NATIONAL STORAGE PVT. LTD. reported in 66 ITR 596. On page 602 confirming the judgement of the High Court, the Hon'ble Supreme Court has observed thus:

> "In our view, the High Court was right in holding that the assessee was carrying on an adventure or concern in the nature of trade. The assessee not only constructed vaults of special design and special doors and electric fittings, but it also rendered other services to the vault-holders. It installed fire alarm and was incurring expenditure for the maintenance of fire alarm by paying charges to the municipality. Two railway booking offices were opened in the premises for the despatch and receipt of film parcels. This,

it appears to us, a valuable service. It also maintained a regular staff consisting of a secretary, a peon, a watchman and a sweeper, and apart from that it paid for the entire staff of the Indian Motion Picture Distributors' Association an amount of Rs. 800/- per month for services rendered to the licensees. These vaults could only be used for the specific purpose of storing of films and other activities connected with the examination, repairs, cleaning, waxing and rewinding of the films."

8.2 The learned counsel for the assessee has also relied on another judgement of the Hon'ble Supreme Court in the case of KARNANI PROPERTIES LTD. VS. CIT reported in 82 ITR 547. The facts of the present case are identical to the facts in the case of KARNANI PROPERTIES LTD. (supra). Therefore, the learned counsel for the assessee has relied on the said case. On page 552, the Hon'ble Supreme Court has observed thus:

"Property is regarded as yielding income from the exercise by the proprietor of the right either of himself enjoying the possession or of parting with the possession by letting his property to tenants. The owner of property may make profit out of it in other ways and by doing so he may render himself liable to taxation under Schedule D. The case of Governors of the Rotunda Hospital, Dublin vs. Coman (1921) 1 A.C. 1 is an excellent example. There as lord Chancellor Lord Birkenhend pointed out at page 8, the arrangements between the owners of the premises and the persons who paid for their use for the purpose of enteainments were not such as to constitute the relation of landlord and tenant, and the owners remained in possession and occupation of their property."

8.3 On page 553 the Hon'ble Supreme Court has further observed as under:

"The receipts derived from hiring out their premises along with various movable fittings, and affording services in the way of heating, lighting and attendance, were receipts of an enterprise quite distinct from the ordinary receipts which a landlord derives from letting his property."

8.4 The learned counsel for the assessee has relied

on Division Bench judgement of this court in the case of CIT VS. AMORA CHEMICALS (P) LTD. reported in 178 CTR 64. This court (Coram: A.R. Dave and D.A. Mehta, JJ) on pages 67 & 68 at para 10 has observed as follows:

"Having heard both these parties and after taking into consideration the orders of the Tribunal, we find that the view expressed by the majority does not require any interference. It is apparent that the Tribunal has taken into consideration all the relevant factors and applied the law in correct perspective on the basis of facts and evidence, which have come on record. Nothing has been pointed out on behalf of the applicant Revenue so as to enable this court to take any other view of the matter. The figures of rent received and the rent paid by the assessee company, as reproduced hereinbefore, go to establish clearly that the assessee had undertaken a business venture and it was only because of the systematic activities that the assessee company carried on, that it was in a position to earn such a handsome rent after paying rent at a lower rate."

8.5 The learned counsel for the assessee has stated that the aforesaid view has been taken by the Bombay High Court in the case of CIT Vs. ASSOCIATED BUILDING CO. LTD. reported in 137 ITR 339 (at 344-345), Punjab High Court at Delhi in the case of MANOHAR SINGH VS. CIT reported in 58 ITR 592 (at 597), Andhra Pradesh High Court in the case of CIT VS. AP SMALL SCALE INDUSTRIAL DEVELOPMENT CORPORATION reported in 175 ITR 352 (at 358).

9. We have considered the facts of the case. We have also considered the judgements of the Hon'ble Supreme Court in the case of CIT Vs. National Storage Ltd. (supra), Karnani Properties Ltd. Vs. CIT (supra), and judgement of the Division Bench of this court in the case of CIT Vs. Amora Chemicals Pvt. Ltd. ITR No. 79 of 1988 decided on 28.8.2002, and other judgements of various High Courts which we have referred to earlier. We have also considered the findings of the Tribunal and the findings of the Commissioner of Income-tax (Appeals).

CONCLUSION:

9.1 It is no doubt true that since a specific head of charge is provided for income from ownership of house property, rents or other income from ownership of house

property cannot be brought to tax under any other head. However, in our opinion, when the property has been let out not only as a property but with services which is a complex letting, the income cannot be said to be said to be derived from mere ownership of house property but may be assessable as income from business. If the owner of a property carries on upon the property some activities which result in profits and gains arising, not from the ownership of the property but from the owner's user thereof, in the present case letting various services to the tenants, those profits and gains may be chargeable under S. 28 as income from business, apart from the assessment under this Section in respect of the income from house property. Thus, if an owner holds a property for a business purpose and receives from his tenants rents which include charges for supplying various services, the owner would be chargeable under this section in respect of the annual value of the property and under S. 28 in respect of the profits he makes by rendering the services to the tenants (Re: Palkhiwala Income-tax, 8th Edition, page 429-430).

9.1A Income from house property - Notional income The Income-tax Act deals with cases of `notional' income which may be contradistinguished from real income and the aptest illustration is found in the taxation of income from house property, especially self-occupied properties. "Income from house property" is an artificially defined income and the liability arises from the fact that the assessee is the owner of the property. The word "business" has been defined in Section 2(14) of the Income-tax Act, 1961 to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. This definition, being an inclusive one, is indicative of an extensive and expanded meaning rather than a restricted or narrow meaning. In view of this, the activities which may amount to business need not necessarily be by way of trade, commerce or manufacture, or be in the nature of a profession. They may even consist of rendering of services as in the case of selling agents, managing agents and these services may be of a variegated character. In this connection, reference may be made to the Supreme Court decision in the case of LAXMINARAYAN RAMGOPAL & SONS LTD. VS. GOVERNMENT OF HYDERABAD (1954) 25 ITR 449 wherein it has been emphasized that the considerations which apply for deciding whether there is a business in the case of individuals within the meaning of the inclusive definition may not necessarily apply in the case of incorporated companies. (Ref: Tax Jurisprudence by D.A. Upponi, pages 250, 314-315).

9.2 It cannot be disputed that the assessee was not only receiving the amount of rent from the tenants but was also receiving amount in consideration of the services rendered to its tenants. For the said purpose the assessee had maintained certain staff and had also invested amount in several assets like air-conditioners, air conditioning plants, telephones, water coolers, canteens, furniture and fixtures. The assessee had also recruited and maintained specialised persons so that proper services can be rendered to the tenants.

9.3 Looking to the above referred undisputed facts, we cannot deny that the assessee was in business of rendering such services to the tenants.

9.4 Looking to the facts of the case and the law laid down by the Supreme Court in the judgement referred to hereinabove, we are of the view that the Tribunal was in error while considering the income of the assessee as "income from other sources". The income was received by the assessee under two different heads. The assessee was getting rent from the tenants as the buildings had been let to the tenants. In addition to letting the buildings or parts thereof, the assessee was also rendering numerous services to the tenants. In fact, the assessee was in business of rendering such services and therefore the amount which the assessee had received for rendering such services should be taxed under the head "profits and gains" of business or profession.

9.5 In view of the above referred position, the natural consequences would be that the amount of rent received by the assessee should be taxed as income from house property and all permissible expenditure incurred by the assessee or the expenditure deemed to have been incurred by the assessee as allowable under the Act should be deducted from the income of rent. Looking to the said fact, the assessee cannot claim depreciation on the value of the buildings. Thus, the deductions, which are permissible can only be allowed in respect of the rent.

9.6 So far as income received by the assessee for rendering other services to the tenants are concerned, the said income should be treated as income from business. All expenditures which are permissible under the provisions of Sections 32 to 38 of the Act should also be deducted from the income so received. Thus, the activity of rendering services to the tenants should be treated as a business and as such all expenditure

incurred for the purpose of rendering such services should be allowed as deduction to the assessee.

9.7 We therefore opine that the income which the assessee has received towards rent from the property leased by it should be treated as "income from house property" whereas income received by the assessee towards different services rendered to the tenants should be treated as "profits and gains of business or profession" and accordingly the allowable expenditure shall be deducted from the respective heads of the said income. The Tribunal shall look into the facts and give effect to the aforesaid direction for the purpose of assessing income of the assessee for the assessment years in question.

10. In view of the above conclusions, we answer the questions referred to us as follows:

10.1 So far as the first question is concerned, our answer is in negative i.e. we decide the question in favour of the assessee and against the revenue. In view of our which we have given, the assessee will be entitled to permissible deduction as income from house property to the extent for which the property is used and also deduction permissible under the head "income from business" as we have held the said income as income from business.

10.2 So far as second question is concerned, the Tribunal was right in allowing collection charges amounting to 6% of A.L.V.. under the head "house property income". However, as regards balance amount, the assessee is entitled to claim deduction under Section 28 of the Act.

10.3 As regards third question, the Tribunal was not in fully right in upholding the order of the Commissioner of Income-tax (Appeals) bifurcating the income as income from "house property" and income from "other sources". We have held that the order of the CIT(A) bifurcating from "other sources" but "income from business" to the extent to which services are rendered by the assessee.

10.4 So far as the fourth question is concerned, the Tribunal is not right in upholding the order of the CIT(A) allowing the assessee's claim of depreciation.

10.5 As regards fifth question, the Tribunal is not right in law in allowing the claim of the assessee

regarding depreciation amounting to Rs. 50,486/- on other assets. The assessee is entitled to depreciation treating the income under the head income from business under Section 28 of the Act.

10.6 In the circumstances the Tribunal was justified in accepting the income from complex letting as income from business and the Tribunal was justified in allowing 1/6th repairs of the properties in question in place of repairs to building at Rs. 2,08,118/- (Rs. 1,94,476/- for assessment year 1975-76) claimed as business expenses.

10.7 The reference thus stands disposed of with no order as to costs.

(A.R. DAVE, J)

(K.M. MEHTA, J)

(pkn)